

APRIL 26. 1766.

R E P L I E S

F O R

Sir JOHN GORDON of *Invergordon*, Bart.

T O T H E

A N S W E R S for His Majesty's Advocate.

THE question now in agitation before the court, is a question of the utmost importance both to private and to public justice, and the petitioner thinks he may add, that it nearly concerns the *British* constitution itself, involving in it a point which, if decided against him, must vest powers in his Majesty's advocate, which were never yet imagined to be vested in any officer whatever, and which the public law hath refused to the King himself, *viz.* A power of disabling, or dispensing with the laws of the realm.

The fatal tendency of such a power cannot be illustrated by a stronger instance than occurs from the case which gives rise to the present application. Bribery is a constitutional evil, and an evil more to be dreaded than high treason itself: Its tendency is as certainly to the subversion of the constitution, as the tendency of treason; and when the means are considered, the former may be called the murder of the body politic by poison, while the latter is murder perpetrated by open violence; a crime, which, as it is more easily guarded against, is the less dreadful of the two.

In former times, the liberty of the subject, and the constitution of the body politic, have suffered much from the violence of the crown; and much care and pains has been bestowed by our ancestors to secure us from suffering the like evils in after times. Their efforts have been attended with success. Many firm and
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unsurmountable barriers have been placed as a security for the constitution against violence; so that little is now to be dreaded on that account. But fewer precautions have been taken to secure us against the incroachments of prerogative, thro' the channel of corruption; for that being an evil by them little felt, they were less anxious to guard against it. At present, however, it is the only evil by which the constitution of this country is threatened; and the fewer barriers that the law has fixed against it, the more watchful ought courts of justice to be to render those barriers firm and effectual.

There are two ways only by which constitutional evils can be remedied, the one is by the vigour of the law; the other is, where that proves ineffectual, by opposing an evil of an opposite tendency, so that, by the conflict of the two, neither may preponderate to the prejudice of the public: Thus, while the laws retain their full vigour, government is restrained within its due bounds, at the same time that its authority is established: But if the laws are relaxed, or their executive powers weakened, and government abuses its powers, and commits violence on those whom it ought to protect and defend, resistance is authorised by the great natural law of self-preservation; and such resistance is acknowledged necessary by the fundamental principles of the *British* constitution, which, while the violence of government, and the resistance of individuals, prove a balance to each other, remains unhurt in the middle.

In like manner, while the laws are properly executed, bribery will ever be accounted, and ever will be punished, as a crime of a most atrocious and heinous nature, as it always has been in every free state that hath hitherto existed: But if, either by a defect in the laws themselves, or a defect of some member in the executive part of the constitution, either the crime, when brought to trial, should remain unpunished, or a proper legal inquiry be stifled, and a trial prevented, the only remedy that remains, will be resistance in behalf of the constitution, by the same means by which it is attacked, and to oppose bribery to bribery, in the same way that resistance may be opposed to violence, which, in such a case, becomes in some measure the duty of every friend to the constitution, from a principle of self-preservation.

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Yet; if the doctrines now pleaded by his Majesty's advocate hold true in law, even this last, this lamentable, tho' necessary resource on the part of the subject, will become unavailable, and an inlet will be opened, thro' which, in spite of every other barrier, ministerial influence, and ministerial corruption, may in after times flow in as a torrent, and bear down before them the principles of our so much boasted constitution, and every security which the industry of our ancestors has provided against the power of the crown, leaving nothing but wrecks, to indicate to posterity the blessings which their forefathers were in possession of, and which will only serve to make their misery the more deplorable.

For, let us consider for a moment what is the nature of that office, in behalf of which the respondent claims such ample and unlimited privileges:—Is it not an office disposed of by the crown without controul? Is it not an office held during the pleasure of the crown? and, Is it not an office exercised under the direction of the crown itself, and for the exercise of which, the person who holds it is accountable to the crown? None of these positions will be denied by the respondent; and the last of them has been strenuously pleaded for in these answers; for the respondent pleads, that he is accountable to none in the exercise of his office, but the Sovereign and his own conscience. Now, let it be supposed, that in future times there should arise a Prince, or supposing, that under any future Prince there should arise a minister that views the liberty of the subject with an evil eye, and wishes to raise up a despotic throne on the ruins of the antient constitution, could he form a plan more likely to succeed than that of corruption, or one that would be more easily carried into execution, if the principles pleaded in these answers are true? for, on his part, he might exercise corruption with impunity, while he could at pleasure name a King's Advocate, who would act in subserviency to his measures: Such a person would put his *veto* on all prosecutions against the corrupt partisans of administration, while, if the unfortunate subjects should endeavour to secure their liberty by the same methods that were practised against them, they would be harrassed by criminal prosecutions; and mulcts, disfranchisements, and corporal punishments, would be distributed liberally amongst them.

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In such a point of view, the present question must appear to your Lordships, to be a matter deserving your peculiar attention. It appeared so to the petitioner, and he endeavoured to submit it to your consideration, naked and in its own merits, unmixed with any personal reflections or aggravations, borrowed from private anecdotes; neither will he now have recourse to personal invective, or wander from the cause, tho' provoked to it by many things thrown out in the answers, noways material to the question in agitation between him and the respondent; he resumed as many of the facts relative to the *Michaelmas* election of the burgh of *Dingwall* for the year 1758, and the procedure following in consequence thereof, as were necessary to place the present question in a proper light; farther he went not, and farther he does not intend to go.

For this reason, he will not enter into the particulars of a memorial he presented to the privy council, concerning the warrant for a pole, which was granted for restoring the borough of *Dingwall*, after the election of magistrates and counsellors, made in the year 1758, had been reduced; tho' both the nature of the memorial, and the judgment passed on it, are much misrepresented in these answers.

The petitioner does not deny, that he presented to the privy council a memorial upon that subject, wherein he had occasion to complain of some particulars in a report made by the crown lawyers, with respect to the above mentioned poll: Which memorial was dismissed by a committee of the privy council; but it never was declared groundless or false. As the affair is stated in the answers, your Lordships would naturally be led to imagine, that the matter had been fully canvassed; that a proof had been taken, and that upon a full examination, the complaints contained in the memorial, had been found to be entirely groundless. The fact is, that the merits of the petitioner's memorial were never at all entered upon; no proof was taken, and no examination made. The memorial was found to be incompetent in point of form, and noways pertinent to the issue; and therefore, a proof of it was thought improper and inadmissible: So the judgment was explained by the members of that honourable court, at the time when it was pronounced; and the insinuation in the answers is altogether unjust.

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The respondent much mistakes the nature of the petition, when he considers his application to be a personal complaint against his Majesty's advocate, for a breach of the duty of his office: It contains no personal conclusions against him whatever; and therefore, is very improperly denominated a complaint; it is no other than an application to your Lordships to determine a general point with respect to the powers vested in the King's advocate, and to pray your Lordships direction, concerning the execution of those powers, as a preparatory step to a criminal prosecution. It is humbly apprehended, that the question in dependence relates entirely to the office itself; so that, if the gentleman who now holds that office should quit it to-morrow, the petitioner will be obliged to take up the general question against his successor in office, and the successor in office would be bound by the decision of your Lordships.

For this reason it was, that the petitioner carefully avoided entering into personalities, and confined not only his reasonings, but his facts to the general point; he wishes the respondent had done the same; and, instead of pretending to search the petitioner's heart for improper motives for this application, and imputing it to chagrin, disappointment and personal resentment, he had joined issue with him on the general question. The petitioner, however provoked, will not follow him in his digressions; he will wander from the cause no farther than is necessary for his own vindication; for it is his interest to keep the merits of the cause within as narrow bounds as possible, and to present them to the consideration of your Lordships as closely connected as he can.

He apprehends therefore, that it is exceedingly immaterial to the present issue, what were the opinions, or what was the conduct of the respondent while employed in a private capacity; as his council, in the disputes that occurred in consequence of the *Dingwall* elections 1758. The petitioner is not complaining of him on account of any failure in point of duty to him as his client, and he does acknowledge, that he conducted himself according to the opinion given by him and others of his council; particularly, in bringing that suppletory action which was afterwards dismissed, upon a plea to the jurisdiction of the court of session; and tho' indeed he brought an appeal against that judgment of the court of

session, contrary to the opinion of the respondent; yet he did so, because the respondent was single in that opinion, and because all his other council advised that appeal.

And with respect to a criminal prosecution in this court, at the instance of his Majesty's advocate, which was spoke of soon after the respondent was invested with that office, and which he says, he peremptorily refused, by his note of the 7th *February* 1762, it may be observed, that many conversations passed between the petitioner and the respondent on that subject, and various cards and missives were wrote about it; but from what passed on these occasions, the petitioner had no reason to look on the respondent's card of the 7th *February* 1762, as a decisive answer; nor did he himself consider it in that light, as appears by the notification made to the petitioner by order of the respondent, of date the 19th *February* 1763, wherein he evidently indicates, that he would take no decisive resolution, till such time as the opinion of the house of peers concerning the jurisdiction of the court of session should be known; and even after that, it appears by his letter of the 22d *March*, that he was not fully resolved what he would do, but intended to consult with the others of the King's council, upon his return to *Edinburgh*.

The petitioner must therefore acknowledge, that he was not a little surpris'd both at the matter and the stile of the answer to the representation and information, of date 14th *April* 1763. After the answers that had been made to him in the *February* and *March* preceeding, he had no reason to imagine that the King's advocate would have taken it amiss that another application was made to him; nor does he think, that his frequent applications, from the time that the respondent was first vested with the office of his Majesty's advocate, a decisive answer to which had been put off till the determination of an appeal, which was not determined sooner than *March* 1763, and till the respondent should return from *England*, which did not happen till *April* thereafter, would have been refused in the month of *June*, on account of the distance of time at which they were made.

No doubt, the present application to your Lordships, comes later than could have been wished, but that is by no means imputable

able to the petitioner; a variety of unavoidable accidents have occasioned the delay, by far the greater part of them owing to the judicial procedure which ensued the *Dingwall* elections 1758, which was not concluded till the year 1763; and, before the conclusion of which, an explicit answer from his Majesty's advocate could not be procured, nor, indeed, was it altogether proper to insist for one; and, since that time, the petitioner delayed his applications to this court, partly on account of his being out of the country, and partly in hopes that his Majesty's advocate might have been prevailed on to explain the answer he had formerly given, in such a manner as might have made the course of justice extricable, without that extraordinary remedy that he is now obliged to apply.—Another reason likewise concurred; in a case so new and unprecedented, the petitioner did not chuse to proceed without advice; and some time was spent in taking the opinions of different council both in *England* and *Scotland*, about the propriety of the respondent's conduct, and the manner in which he ought to proceed, to procure redress.

His Majesty's advocate, in these answers, seems to suppose himself vested with judicial authority, and to have expected, that the petitioner was to have sent council to plead before him the ground of the demand that he now makes.—This, however, seems a most unprecedented claim, he did what he apprehended was proper; he required the advocate to give his instance for the prosecution of a crime of which he offered evidence, and agreed to defray the expence of a trial; he presented a signed information, by which he tied himself down to all the consequences that might follow, if the prosecution should be found vexatious; and he apprehended, that the advocate was in duty bound to give such instance; but, when the King's advocate refused it, the petitioner did not apprehend that it was his business to employ council to instruct his Majesty's advocate in the duty of his office.—The whole facts were sufficiently known to the respondent himself, who had been concerned as a lawyer in the whole of the proceedings relative to the *Dingwall* elections; and if he had wanted council, to obviate any doubts, it was his business to have demanded a conference with them.—The course which the petitioner apprehended the law pointed out to him, was to apply to a court of justice, that it might be legally

gally tried what the advocate's duty in this particular was, and; accordingly, he made the present application to your Lordships, as the proper and competent court for trying this question.

The respondent is at great pains to misrepresent the nature of that criminal action, in which he is desired to give his instance by the petitioner: He supposes that it must be founded on the statutes of the 2d and 16th years of his late Majesty; and having laid this down as a *postulatum*, he next tells your Lordships, that such an action is already prescribed, and he descants upon the evil consequences that may be supposed to ensue from an officer of the crown intermeddling in matters relating to elections, and bringing criminal prosecutions, on account of such matters, at a distant period of time after the election, in the course of which, the crimes are said to have been committed. In none of his positions, however, on this head, can the petitioner agree with him.

For, in the *first* place, the statutes of the 2d and 16th of his late Majesty, do not, in any shape, concern such bribery as the petitioner wants to bring to trial. These statutes punish bribery only in the case, where it is committed in the election of a member of parliament, or in the election of commissioners from burrows, to chuse a member to serve in Parliament; but they do by no means punish bribery committed in the election of magistrates and counsellors of royal burrows, that is left to the common law, which, as it holds bribery to be a crime, will not permit it to escape unpunished.

And, in the *second* place, tho' the crimes which the petitioner wants to bring to trial, should be such as might be found punishable by the statutes of the 2d and 16th of the late King; yet still, their being punishable, in certain circumstances, by statutory penalties, will not derogate from the common law, which hath declared them crimes, and by which they are punishable, independent of any statute. The statutory prescription may take away the statutory action: Thus, by those statutes, a pecuniary mulct is inflicted on bribery, and an action is given *cuiuslibet e populo*, for recovery of that mulct, to be applied to his own private use, either by an action in the court of session, or a prosecution in this court, and certain incapacities and penal consequences are declared to follow upon conviction: Now, tho' the statutory prescription

tion may operate, so far as to take away the action before the court of session, and also to take away the right of a private prosecutor to the statutory mulct, and every other statutory peculiarity; yet, as nothing appears in those statutes, that can derogate from, or repeal the common law, it still remains competent to the publick prosecutor, to insist for punishment of the crime of bribery upon the common law, before the proper criminal court.

And had the action that is proposed to be brought, been to be laid on the statutes of the 2d and 16th of his late Majesty; neither the instance of the King's advocate would have been necessary; nor was it requisite the action should be brought in this court; it would been a popular action, and was competent in the court of session; and, could the suppletory action in the court of session have been founded on those statutes, no plea would have layen to the jurisdiction of the court.

The respondent does, indeed, seem to suppose, that the common law has enacted no punishment against the crime of bribery; in that, however, the petitioner cannot agree with him, nor does he presume your Lordships will at once assent to so strange a position: The crime of bribery has been known almost in every state, as early as magistracy has been firmly established: it hath ever been reputed one of the grossest malversations in office, that either a magistrate, or those who have been invested with the power of bestowing magistracy, can be guilty of; and, among the *Romans* in particular, from whom we have borrowed what we call our common law with respect to crimes, the *crimen ambitus* was well known, and severely punished; and the petitioner has little doubt, but that, upon an accurate discussion, your Lordships will find, that this crime, together with others, has been transferred from their law to ours. The favourers of arbitrary power, indeed, have endeavoured to support the contrary opinion; and Sir *George Mackenzie*, partial to the principles and practices of an administration under which he served, hath, in his institutions, *Book 4. tit. 4. § 20.* said, that "*ambitus*, or the obtaining offices by unjust means, is not punishable under monarchy." Yet the same author, in his criminals, speaks a very different language; where he can find *termini habiles* for laying this accusation, so as not to touch the practices of those whom his general position above mentioned was meant to screen: He says, "The *Romans*, considering how destructive those were to
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" the commonwealth, who endeavoured, by all indirect means,
 " to screw themselves into public employments, did therefore
 " make this indirect dealing to be a crime, and called it *ambitus* ;
 " which punished, *lege Julia*, those who gave money for making
 " themselves magistrates, or that they might attain to honours.
 " It is commonly thought, that how soon the power was trans-
 " ferred from the people to the senate, and from the senate to the
 " prince, this crime ceased, because the prince, having the sole
 " power of bestowing magistracy and honour, is still presumed in
 " law to bestow them upon those who deserve best, *Groneveg. de*
 " *leg. abrogat. ad h. t.* But yet I see not why the prince may not
 " justly cause punish those who have wronged both the public in-
 " terest and his favour, in prostituting both to so unworthy a sale :
 " And since commissioners for parliaments, and *magistrates of*
 " *towns, are still elected by plurality of suffrages, I see not why such*
 " *as bribe the electors, may not be liable to the same accusation.* The
 " punishment of this crime was deportation, which was much
 " like our banishment, and in lesser towns it was punished by a
 " fine of 100 crowns, and infamy ; and since it is a kind of brib-
 " ing, I think it should be punished with us as such." And indeed
 the petitioner has not the least doubt, but that a criminal libel
 for bribery may be supported, both on the common law, and on
 our ancient statutes : That, however, is not *hujus loci* to dispute ;
 it is time enough to do so when a libel is actually served, and a
 proper party is in court, when, if his Majesty's Advocate doubts
 of the relevancy of such a libel, the petitioner will, if he desires
 it, join to him other council, who will endeavour to support it ;
 or even when a bill for criminal letters for such a crime is offered,
 the petitioner will, if your Lordships require it, endeavour to show
 cause why such a bill ought to be passed : But in the mean time,
 it is humbly apprehended, his Majesty's Advocate ought to give
 his instance to such a bill ; nor can he arbitrarily refuse to allow
 this point to be brought to trial, Whether bribery is a crime by
 the common law or not ?

And with respect to the bad consequences which he supposes
 may result from an officer of the crown meddling in election mat-
 ters, and bringing criminal prosecutions at a distance of time, on
 account of what happened in the course of elections, the petiti-
 oner does acknowledge, that he can by no means enter into the
 reasonings of the respondent on that head : If bribery is a crime,
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and a criminal action lies for the punishment of it, that action must subsist at least, till cut off by prescription. The petitioner does not here enter into the question, Whether the prescription of criminal actions takes place in the period of 40 or of 20 years; or whether there is any such thing, by the law of *Scotland*, as a prescription of criminal actions? it may suffice in the general to say, that no lawyer ever yet pretended, that a criminal action, founded on the common law, can be cut off by prescription, in a shorter period of time than that of 20 years:—If, therefore, it is the duty of his Majesty's Advocate to prosecute at all; it is his duty to prosecute as long as the action subsists; and if it is his duty to prosecute, the prosecution must be carried on indiscriminately, whether the bribery to be punished was exercised in favour of those who were partial to the measures of administration, or those who stood in declared opposition to them; the exercising his duty impartially, and bringing all concerned in bribery to condign punishment, can never be attended with any evil consequences, and may produce many good ones; it is a conduct that must ever be favourable to the liberty of the subject and the constitution of parliament, whilst the power of refusing arbitrarily an official instance, for the purpose of bringing the corrupt to justice, as hath already been shown, may prove fatal to both.

Nor need the respondent be afraid, that in bringing to justice the offenders in the case of the *Dingwall* election, he would have appeared to have "prostituted the power of his office to the political resentment of a client;" for, as his client desired no such prostitution, but only called on him to exercise what he apprehended to be the duty of his office, so he, in the execution of that duty, ought to have despised all private obloquy, and, without fear or dread of resentment or calumny, to have attended only to public justice, and the due execution of the law, without distinction of persons.

In short, tho' the respondent pretends to say, that if he should give way to the demand that is now made, "by such a precedent, he would turn his office into an engine of power, in influencing elections which no friend to the liberties of the country would wish to see:" The petitioner apprehends, that quite the reverse must appear to be the case; his office may be converted into an engine of unconstitutional influence, if he is permitted to exercise it arbitrarily, and without controul of the courts of justice, or to
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set up a plea, that he is not amenable in them ; but if he exercises it impartially on every occasion, when proper materials are laid before him, to enable him to bring a criminal prosecution, and under the direction and controul of the courts of justice ; instead of an engine of illegal influence, it is no more than a proper mean of legal terror, to prevent men from infringing the public law.

The respondent does indeed say, that he offered his concurrence, which he is pleased to alledge was all that could be asked of him, or that he was obliged to grant, and that by virtue of that concurrence, the petitioner might, if he had a sufficient interest to insist for punishment of this crime, have brought the offenders to justice.

The petitioner will not here enter on a discussion on what might have been the case, had the King's Advocate offered his concurrence to the petitioner *nominatim*, but he would not even so much as say, that he would give his concurrence to him personally ; and even when such concurrence had been obtained, it still remained, to discuss the validity of the petitioner's title to pursue, which was a question too nice to be supposed extricable, without much trouble and great expence : The petitioner had heard this topic much insisted on, when his suppletory action was pleaded before the court of session ; he had been there told in the pleadings at the bar, and particularly in a printed information in behalf of Colonel Scott, that nothing less than the instance of the King's Advocate, was available to bring the crime of bribery to trial, nor had that point received a decision ; tho', therefore, his private opinion had been, that he had an interest to pursue ; and even tho' the advocate had offered to second that interest, by lending his concurrence to him *nominatim*, yet he was convinced from what he had heard, that the matter was at least so far doubtful, that it might become the foundation of a tedious and expensive litigation, more especially if the dispute should be agitated as an incidental question in the course of a criminal prosecution ; and if it should then be determined against them, he would have had the same litigation to maintain that he does now, without any advantage gained.

The respondent is pleased indeed, to talk very lightly of this position, that the instance of the King's Advocate is necessary to bring those guilty of bribery to justice, and condemns it as absurd and untenible ; he tells your Lordships, that the actions introduced

ced by the statutes of the 2d and 16th of his late Majesty, are popular actions, and require neither instance nor concurrence: But in this, he is endeavouring to lead your Lordships away from the merits of the case in hand; it is not an action founded either on the 2d or the 16th of the late king, in which the petitioner demands his instance; neither of these relate to the crime which he wants should be punished; it is an action at common law that the petitioner contends for; and there it will not be denied, that the instance of his Majesty's Advocate is exceedingly proper, and generally deemed to be an essential requisite, at least the petitioner has the utmost reason to think so, after the doctrines he heard pleaded, when the suppletory action was in dependence before the court of session.

The respondent asserts, " That there is nothing more fixed in the law of this country, than that the prosecution of all crimes *ad vindictam publicam*, belongs to the King, and to his Advocate, acting by his authority and for his interest: Hence it is, that all such actions are under his power and controul, to be insisted or deserted as he sees cause. No lawyer of this country has ever suggested the least doubt of the Advocate's power of deserting the diets of all actions brought for his Majesty's interest; and no instance appears, or can be suggested, of your Lordships interposing your authority to stop this part of the execution of his office." And he subjoins this query: " If then he is master of every such action brought at his instance, and may desert it when he sees cause, how can it be maintained, that any private party can, by your Lordships authority, compel him to take up and prosecute such action?"

The very principles on which the respondent here argues, are those which give occasion to the demand made by the petitioner; it is because the *vindicta publica* belongs to the King's advocate, that the petitioner craves he may be ordained to give his instance in the criminal action pointed out: But the consequences drawn from those principles, or even the more remote principles on which the respondent seems inclinable to found these, the petitioner can by no means agree to: The respondent seems inclinable, in the matter of criminal actions, to view the Sovereign of *Britain* in the light of an arbitrary despot *quoad Scotland*, and to consider the King's advocate as the sole minister of his despotism; but it is apprehended your Lordships will view him in another light: The

Sovereign is the first magistrate, the *pater patrie*; whose duty it is to watch over the lives and properties of the subjects, and to render them secure by executing, with vigour, the publick laws of the country: Hence he is indeed intrusted with the power of naming all proper executive officers of the law, but that power is circumscribed by the law, and must be exercised in a legal mode, and under legal limitations. Thus, it is the Sovereign who commissions all the judges in our courts of judicature; but he must grant them such commissions as the law directs, and he must leave the judges to execute the law after he has named them: He can neither erect new courts of judicature, nor prescribe new rules for those courts, already erected, to walk by; and by no means can he dispense with the laws already made. In like manner, it is his duty to appoint proper officers to raise and insist in those actions that concern the publick, and to bring them before the courts of justice for discussion; but these officers, as well as the judges, must be named according to the direction of the law, and they must execute the law when once they are named.

And tho' later practice seems to have invested this *vindicta publica* in the King and his officers, yet, from the beginning, that does not seem to have been the case, nor to have obtained in the earlier periods of our law: Thus, before the year 1587, the instance of the King's advocate seems to have been a thing unknown in criminal prosecutions; for by act 1587, *ch.* 77. which is entitled, "The King may persew all crimes without the party," it is enacted, "That the thesaurer and advocate persew slaughters and utheris crimes, althouth the parties be silent or wald utherways privily agree." The King's advocate, therefore, tho' an officer named by the King, derives his power of prosecuting crimes, not from any emanation of the prerogative, but from the publick law; his office is the legal medium thro' which the executive power of the crown is exercised: And the same law which hath invested him with the power of prosecuting, hath also, in the petitioner's apprehension, laid him under a legal necessity of exercising that power for the behoof of the publick; it is not left to him to make an option, whether he shall exercise the power or not, but it is enacted, that *he persew* altho' the parties be silent. Where the expression hath been much weaker than this, and where it has only been declared *lawful* for the King, or his officers, to do a thing, it hath been adjudged that these words imported a legal necessity, for that every thing that was declared
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lawful, was obligatory on those invested with a publick office. This was in particular decided in the case, the Earl of *Hopeton contra* the Officers of State, 4th *January* 1750, in a question about the interpretation of an unprinted act of parliament 1592, relative to mines; *multo magis*, therefore, will a statute be understood to be absolutely obligatory, where the words in their natural sense import an obligation. And, indeed, unless the statute is interpreted in this sense, it must be a very imperfect and ineffectual law; the obvious meaning and purpose of it was to prevent the escape of criminals, from the collusion of private prosecutors: It was therefore thought necessary to impose a necessity on some person or other to prosecute, in a publick capacity, *ne crimina maneat impunita*; and the persons thought proper for this purpose, were the Treasurer and Advocate, on whom it was certainly meant to impose a legal necessity of prosecuting.

As, therefore, there is a legal duty to be exercised by all the executive officers of the law, tho' named by the King, so there must somewhere or other be lodged a power of enforcing the exercise of that duty; and where can such a power be supposed to be lodged but in the ordinary courts of law, whose office it is to enforce every legal obligation? Judges, we know, may be tried for malversation in office, and punished for the denial as well as the perversion of justice; and shall his Majesty's advocate, who in the quality of publick prosecutor is no more than the procurator fiscal of this court, set up a plea of immunity, and deny that he can be controuled, for no other reason but because he holds his commission from the King? Does not every judge do the same? And is not every judge, tho' vested with a superior character, amenable for his conduct in the exercise of his office?

The respondent tells your Lordships, that no lawyer has ever suggested the least doubt of his Majesty's Advocate's power of deserting the diets of all actions brought for his Majesty's interest. In this, however, there is a clear abuse of words: It is not the King's Advocate who deserts diets, it is your Lordships; who, as you only can continue diets, so you only can desert them. And accordingly, in every case where a diet has been deserted, it will be found, that the record bears, the court deserted the diet, and not the King's Advocate; and accordingly, your Lordships will desert a diet, whether the King's Advocate agrees to it or no, wherever

wherever an informality in the libel is found, where the executions are improper, or where any other legal bar occurs to prevent a trial from proceeding: The same thing you will do, where no prosecutor appears to insist, or where, when he does appear, he declines insisting. In short, deserting the diet, is the technical term of this court for dismissing an action before the verdict of a jury is returned; and the part that the King's Advocate acts in it, is no more than this, that when he is sensible, either that he has been misinformed in the merits of the cause, and that therefore there is no prospect of convicting the pannel, or that the pannel would have a legal plea, in consequence of which the trial must come to nothing, he sometimes consents that the diet shall be deserted; in other words, he declares that he is not to insist in the libel; whereupon, your Lordships desert the diet, because no person appears to prosecute: But after the King's Advocate has once given his instance, even tho' he should incline to desist from the prosecution, yet your Lordships will not desert the diet if another prosecutor appears, and offers to insist, *usque ad sententiam*, even altho' the crime should be such, as in its own nature not to admit of a private prosecutor. A strong instance of this kind occurred in the case of his Majesty's Advocate and *contra* Colonel *Charters*, who was tried before your Lordships for a rape, which crime being one of the four pleas of the crown, the prosecution of it belongs more properly to the office of the King's Advocate, than that of almost any other crime whatever; yet there, the crown lawyers declared, they would not concur in the prosecution; and tho' the Advocate's instance had been given, they disclaimed the action: The husband of the woman who was ravished, however appearing, and insisting, your Lordships would not desert the diet; on the contrary, you proceeded, and the trial went on, the verdict of a jury was returned, and a sentence was pronounced on that verdict. The power of the King's Advocate, therefore, in commanding the diets of this court, will, upon examination, turn out to be much more inconsiderable than he seems to imagine it is: In fact, it is plain, he has no power of this kind, but what is under controul of the court.

The respondent next enters into a detail of the manner of bringing offenders to trial before the circuit courts, of the presentments that are necessary to be made; and then he tells your Lordships, that he may or may not bring criminals thus presented

to

to trial as he pleases ; and he contends, that as there is no instance of a complaint brought against the King's Advocate, on account of not bringing such criminals to trial, so there is no room for such a complaint, nor is it competent by the law.

This is the very plea that he uses against the petitioner ; but if such a complaint should be brought, it is humbly apprehended, that if sufficient evidence appeared to have been laid before the King's Advocate, to create a probability of establishing the guilt of the criminal presented, you would not consider it as incompetent. That no such complaint has been brought since the act *8vo Anne*, affords no argument that such a complaint would not be well founded. Every case must once have been without a precedent ; and from new cases, precedents for after cases must arise. Before that act, the King's Advocate had no concern in presentments from counties, till they came to be insisted in by his deputies at the circuits. By the old law, the dittay was taken up in the counties ; it was transmitted to the clerk of justiciary, who from that made up the porteous roll for the district of each circuit town, containing the charge against every criminal, in the form of an indictment, in which the instance of his Majesty's Advocate was seldom or never mentioned ; so that, in those days, till such time as the crime was brought to actual trial, the office of the King's Advocate was not concerned. The time, therefore, has not been very long, during which it was possible for the counties to complain of the King's Advocate for refusing to give his instance ; and within that time, it is believed, hardly any instances have occurred, where a prosecution was insisted on, and instance refused. If improper presentments have been sent up, and those who sent them have been satisfied of their impropriety, so as not to insist for their being brought to trial, after the King's Advocate had declined to try them : That is nothing to the present question. But both before the act, *8vo Anne*, in case the advocate refused to insist on a well founded indictment contained in the porteous roll, and since that statute, in case he had refused his instance, when urged to give it, on a well founded prosecution, it can hardly be doubted, but that, on a proper representation to this court, the case would have been remedied, in case it had admitted of a remedy ; and in case it had not admitted of a remedy, there is as little doubt, but that the King's Advocate was punishable for his breach or neglect of duty.

For there is no question that both by the civil law and by ours, the *crimen prævaricationis*, or collusion of the prosecutor of a publick crime with a criminal, is highly censureable; and there is as little doubt but that either the refusal of official instance for the prosecution of a crime when attended with the effect of making the criminal escape, or desisting from the prosecution under such circumstances, as to give the criminal an opportunity of procuring an improper sentence absolvitory, would be considered in no other light than as the crime of collusion, and must be punishable as such; but where the criminal hath not escaped by means of such official collusion, there being still room for a remedy by a proper exertion of the official powers of the publick prosecutor, there a court of justice will interpose, and oblige him to exert those powers.

The respondent argues, that a court of justice intermeddling in such a matter, would tend to renew the method of trial by precognition, which was formerly exercised by the privy council of *Scotland*, to the great nuisance of the country, but which are expressly prohibited by the commission erecting the court of justiciary into its present form.

What commission the respondent here points at, the petitioner is at a loss to guess; the act 1672, which is the only legal commission constituting the court of justiciary, has not one word in it about a precognition, or any thing relative to a precognition; and it is well known, that your Lordships have taken precognitions, for the purpose of informing his Majesty's advocate, at no very distant period of time; and there seems to be no objection against your judging what is the duty of his Majesty's advocate, in consequence of such a precognition when taken, that does not lie against taking the precognition itself. The taking such precognitions, or the judging of the duty of the King's advocate in consequence of them when taken, do not, in the most distant degree, resemble those trials by precognition, which were in use to be carried on formerly in the privy council, and were justly complained of by the whole nation; for these were intended, not for the furtherance, but for the destruction of publick justice; and tho' at first mention of them, one would be led to think, that they were engines of cruelty intended to oppress the innocent; yet, in fact, they were quite otherways, they were engines of ministerial partiality, calculated to screen and favour the escape of the guilty:

guilty: For a trial by precognition, generally proceeded at the instance of a pannel, it was held *intra privatos parietes*, and the person at whose instance it proceeded, was at liberty to bring what evidence he pleased, at whatever time he thought proper; hence he generally chose a time for adducing his witnesses, when the prosecutor was necessarily absent, so that, by their not being properly cross-questioned, and by no contradictory evidence being adduced, one half of the truth, at least, if not the whole, was concealed; and often without the prosecutor being heard at all in the matter, the pannel was dismissed by the privy council; and this was pleaded as a *res judicata*, in every criminal court; but the precognitions that are in use now-a-days, are no more than preparatory steps to a trial; and, when a legal trial is brought on, they are no longer of any force or effect, they pass not to the knowledge of an assize, nor can they serve any other purpose, than that of directing his Majesty's advocate, how to lay his libel, and adduce his evidence.

Hence, tho' even your Lordships were to pass a judgment on the import of what is contained in a precognition, for the purpose of determining whether his Majesty's advocate should be obliged to give his official instance in a particular case, still that judgment could have no effect whatever on the merits of the trial, nor in the least prejudice the pannel in his defences, for that judgment would make no part of the record of the trial, it would not, any more than the precognition itself, pass to the knowledge of an assize, the pannel would be judged on the evidence of the part of the prosecutor, and on that brought by himself in exculpation, in presence of the jury, and the verdict of the jury founding on that evidence, would be the only rule for the sentence of your Lordships.

Neither would the pannel be any more prejudged in point of law, than in point of fact, by an order of your Lordships upon the King's advocate to give his official instance for bringing a crime to trial; by such an order you do not determine the relevancy of the facts charged previous to it; you do not call on the person accused to plead his defences in law, all these are entire to him after the prosecution is once brought; and there is nothing at all incompatible, in a person being properly called into court at the instance of his Majesty's advocate, upon a criminal indictment,

ment, even by order of the court itself, and that person being afterwards dismissed, on account of the irrelevancy of the libel.

The court of King's Bench in *England* go daily much farther; an information may there be exhibited, and leave craved of the court to file it; and the court will make a rule for the person against whom such information is exhibited, to show cause against a day certain, why it should not be filed; and if the party does not appear to show cause against that day, the information is filed: But even, tho' he should appear and show cause, and tho' that cause should be found insufficient, in consequence whereof the information is filed, still every defence in law and in fact is competent to him, and he is at liberty to urge them all in the course of a legal trial, and to avail himself of them.

In determining, therefore, in any particular case, whether the King's advocate ought to give his official instance to the prosecution of a crime, your Lordships give no judgment on the merits of the criminal prosecution itself, nor do you do any thing that can tend to prejudice the interest of the pannel; nothing is determined with respect to him, it is the duty of the King's advocate only that is under your eye, and the sole thing that you enquire after, is, whether that advocate has done his duty, or not. With equal propriety, that it is alledged, your Lordships, by examining whether the King's advocate ought to give his instance in a criminal trial, or not, prejudge the merits of that trial, it might be said, that the court of session, when on the 31st *January* 1633, they ordained the advocate to give his concurrence to two bills of improbation at the instance of the Earl of *Abercorn* and *James Inglis*, against their vassals, that that court prejudged the merits of those improbations: In fact, however, they did no such thing, they saved all defences even to the advocate himself against the improbations: And there is no more reason for supposing that an enquiry, whether the King's advocate has done his duty, in refusing his instance in a particular case, would prove a prejudicial action to the merits of the case itself, than for saying, that the act of federunt above mentioned, was a prejudicial judgment on the merits of the improbations.

In fact, your Lordships do, in every criminal case, before it comes to trial, pronounce a judgment which might more justly be termed prejudicial, than the one which is now demanded; for no criminal summons can pass the signet of Justiciary, unless upon
on

on a bill containing the whole substance of the libel, which is presented to you, and on which a warrant is obtained for issuing criminal letters; and there can be little doubt, that if a bill should be presented, which, *ex facie*, contained in it nothing of a criminal nature, your Lordships would refuse your *fiat* to the desire of the bill, and no criminal letters could be issued. By your signature on the bill, therefore, you, in some sort, judge of the relevancy of the accusation; yet such judgment was never yet deemed to be prejudicial to the merits of the cause; and the panel, when called to the bar, in consequence of a citation given him on the criminal letters, hath never been held to be precluded from pleading every defence in law against the relevancy of the libel; nay, in former times, there are numberless instances of such libels being dismissed as altogether irrelevant.

The respondent, towards the end of his answers, pleads the powers of his office in very high terms: He denies that he is under the direction of any court whatever: He tells your Lordships, that there have been instances of recommendations from this court, from the court of session, and from the court of exchequer, to prosecute particular offences, occasionally falling under the observation of the judges, but that no instance occurs on record, of such prosecutions being ordered; from which he concludes, that he is not bound to obey the directions given him, by any court whatever.

The petitioner, however, differs from his Majesty's Advocate, both as to the facts themselves, and as to the conclusions he draws from these facts. In whatever terms courts have been in use to address the advocate, when they directed him to exert his official powers, that cannot afford an argument, that he lay under no obligation to obey those directions; they might use the word *recommend*, but where the terms of that recommendation were explicit, it is much the same thing as if they had commanded. Thus, when the court of session appoint council to appear for any person in a particular emergency, the expression they generally use is, That they recommend it to such council; but it cannot be doubted, that such recommendation has the force of a command, and that if those to whom it is directed should contemtuously neglect it, they would be censured by the court for such neglect: In like manner, tho' both this court, and the courts of session and exchequer, may have been in use to give directions,

proceeding from themselves *ex officio* to the King's Advocate, in the way of recommendation, yet still such recommendation imported an obligation on him to do what was recommended to him.

But a little attention will show, that these courts have not always been so delicate towards his Majesty's Advocate, as to use this expression of recommending. In the case mentioned in the petition, of the complaint of the Earl of *Abercorn* and *James Inglis* against the Advocate, 31st *January* 1633, they *ordained* the Advocate to subscribe the bills, and made a general order with respect to his duty in time coming. — The respondent objects to the authority of this precedent; he says, the action of improbation is of a civil nature, and therefore cannot apply to the present case: Admitting it to be so, yet still an action of improbation, is a case wherein the official powers of the Advocate are concerned, and as it occurred in a civil court, it sufficiently shows, that his official powers, in so far as the jurisdiction of the court of session was concerned, were understood to be under their controul. But further, the action of improbation is in reality a criminal action, and the concurrence of the King's Advocate seems chiefly intended to aid the criminal conclusions of the action; this precedent, therefore, is a precedent in point, that the office of the King's Advocate, in so far as the punishment of crimes and the power of criminal prosecution belong to it, is under the controul and direction of the courts of justice. It cannot be expected that the petitioner should be able to lay before your Lordships the various instances that have occurred, wherein the court of session have directed the King's Advocate in what manner his office was to be exercised; such incidents do not usually appear in our printed Collections of decisions, even the case above mentioned is not to be found in any printed collection; and had it not, in consequence of the general order relative to the duty of the King's Advocate, been inserted in the books of *federunt*, the memory of this precedent would have been lost. The petitioner, however, will mention two other cases, where the court of session not only directed the concurrence of the King's Advocate to be given, but even his instance; one of them we find narrated in a very late collection of decisions, in the case of *Barbara Newlands contra Alexander Newlands*, decided *June* 1741, in the following words: " 11th *June* 1577, The Lords of council *ex officio*, or-
" *dained*

"*daigned letters to be directed at the instance our sovereign Lord's ad-*
 " *vocate, to warn Malcolm Bower and Henry Anderson to compar-*
 " *personally before the saids Lords, 21st instant, with continua-*
 " *tion of days, to answer to such things as shall be inquired at*
 " *them, under the pain of rebellion, and putting them to the*
 " *horn.*"

The other case is to be found in Lord Fountainball's collection of decisions, 3d November 1698, where it is reported in the following words: "*William Johnston in Haddington having pursued*
 " *his brother Robert for reduction and improbation of a disposi-*
 " *tion made by their father to the said Robert, of his whole estate and*
 " *moveables; and the instrumentary witnesses being examined,*
 " *two of them acknowledged their subscriptions, but confessed*
 " *they did not hear the defunct disponent give warrant to the no-*
 " *tars to subscribe for him; and the third denied it was his hand*
 " *writ, or that he was at Pople-mill (where it bears to be signed)*
 " *at that time. The Lords, at advising, were clear to find the*
 " *writ null and not probative, but stuck as to the falsehood, see-*
 " *ing two of them acknowledged they signed as witnesses in the*
 " *presence of the disponent, and only the third denied his sub-*
 " *scription; and before answer to the falsehood, or remitting them*
 " *to the criminal court, ordained all the parties on life to be cited at*
 " *the King's Advocate's instance, to be re-examined, for expiscating*
 " *the falsehood, if any be; for the Lords observed, where the par-*
 " *ties got the writs reduced, they thought themselves no farther con-*
 " *cerned to insist any more, and declined the expence of prosecuting the*
 " *criminal part.*"

In passing, it may be observed on this decision, that it destroys the hypothesis the respondent builds on the civil nature of the action of improbation, as if it was owing to that, that he is obliged to give his concurrence in that action: For here, the civil part of the action was brought to a conclusion by a sentence, and nothing remained, but to proceed to the criminal part, in which the court took the direction of the instance of the King's Advocate; and that too, as appears from the narrative of the decision, with a view of founding a prosecution for forgery in this court, to which they had it in view to remit the forgers; and this, altho' they had a proper party in court for carrying on the action, who does not appear to have refused to insist: But the court seeing a probability that public justice might be frustrated, tho' they might have

have compelled the pursuer to insist, *usque ad sententiam* ; yet they chose to order the prosecution to go on in the name of the King's Advocate, who, as the public prosecutor, seemed more immediately bound to prosecute a question of public justice.

It is not to be doubted, that if one were to go to the records of the court of session, upon an accurate search, many other precedents of the like kind might be found. These, however, are sufficient to show, that they have made no distinction between the *instance* and the *concourse* of the King's Advocate, but have considered that both were alike under their controul.

And with respect to this court, it is humbly apprehended, that as the duty of the King's Advocate here, was from the beginning no more than that of a procurator fiscal: So, he stood in the same relation to the court that procurators fiscal do to inferior courts; and, as an officer of court, was as much under the direction of the judges, as procurators fiscal are in the courts in which they practise: And accordingly, if the earlier practice of the court is looked into, it will be found, that that was the case. Thus, originally, it was not the King's Advocate, but the court itself, that made inquiry after malefactors, as is evident from the statute of *Alexander II. ch. 2.* " Statuit dominus rex A-
" lexander, illustris rex Scotiæ, de concilio et assensu vene-
" rabilium patrum, episcoporum, abbatum, comitum, baronum,
" ac proborum hominum suorum Scotiæ, ut *justiciarius suus Laudo-*
" *nia diligentem et privatam inquisitionem faciat de malefactoribus*
" *terræ, et eorum receptatoribus, per sacramenta trium hominum*
" *bonorum et fidelium, una cum sacramento senescalli, de singulis vil-*
" *lis singulorum vicecomitatum infra balliam suam præterquam*
" *in Galluidia, qui leges suas habent speciales. Et si quos, per*
" *dictam inquisitionem legaliter factam invenerit, eos festinanter,*
" *per servientes domini regis, cum auxilio hominum domini vil-*
" *læ, salvo faciat attachiari, et ad certum diem et locum coram just-*
" *ciario per fidele vicinetum transeant.*" Afterwards, either by some law which is now lost, or by practice it obtained, that the Justice Clerk became the proper officer for taking up dittay; and accordingly he is mentioned as such in all our statutes from the beginning of the reign of *James I.* downwards to that of *James VI.* and it was only that officer who made out indictments, or had the power of bringing criminals to trial. But in the year 1587, commissioners of dittay were appointed for the several counties,

counties, who seem to have been vested with the sole power of indictment, and making up the Porteous roll for the circuits, and even for the counties of *Edinburgh, Haddington, and Linlithgow*. And on this footing matters seem to have continued down to the *8th Anne*. In all these cases therefore, the duty of the King's advocate was no more than that of a procurator fiscal, to follow out the indictments that had been made up by the proper officer; his instance was not regarded in the beginning of a prosecution, for the indictment was made up without his knowledge or consent, and was presented to the Justice Ayre, where he prosecuted it officially. It is true, that after the act 1587, *ch. 83.* he might pursue by way of criminal letters at his own instance, but in those days there was no necessity for compelling him in any case to give his instance, because the proper remedy was to lodge an information with the commissioners of dittay, on which the person informed against, might be indicted and put into the porteous roll. There is no question, however, but that if the Advocate had refused to prosecute an indictment regularly served on a pannel, your Lordships would have interposed to compel him to do his duty as an officer of court; and there can be as little question, that now when his instance seems to have become an essential requisite in the prosecution of a publick crime, that your Lordships, upon an improper refusal of that instance, will compel him to give it, *ne crimina maneat impunita*.

And as to the court of Exchequer, as that court is altogether an *English* court, and proceeds upon the principles of *English* law, and by *English* forms, it is humbly apprehended, that whatever the privileges of the King's advocate may be understood to be there, that can have no effect on the nature of the office in your Lordships court: It is believed however, that in the court of Exchequer, the King's advocate is no less under the direction of the court, than he is in the courts of session and justiciary. The petitioner, however, will not enter into an accurate discussion of this matter: The court of Exchequer is of no long standing in this country, and it is believed it seldom, if ever happens, that the King's advocate insists in his own name in that court, most prosecutions being carried on by informations in the name of the officers of the revenue: In disputing upon this point, therefore, the petitioner would be obliged to quote the laws, and recur to the precedents of another country, in which his council are not sufficiently versant; tho' it is believed,

upon enquiry, it will be found, that the courts in *England* not only recommend to, but even direct the Attorney General, in points relative to the duty of his office; and the office of his Majesty's advocate, in the court of Exchequer, it is apprehended, is precisely of the same nature with that of the Attorney General in *England*. These matters, however, are not *hujus loci*, the petitioner is here considering what is the nature of the office of King's advocate by the law of *Scotland*; and whatever may be the case of the Exchequer, which is a court that proceeds by a foreign law, and by foreign forms, that has no connection with the nature of the office in this court.

The petitioner therefore apprehends, that in all the King's courts, the King's advocate is not only judicially amenable to each for his conduct in the exercise of his office in that particular court, but is also under their direction, and bound to obey their orders: They are the King's judges, and he, as the King's servant, must receive directions from them.

The King's advocate, in the character of publick prosecutor at his own instance, is not an officer of the common law, the institution of whose office lies beyond the memory of record; was that the case, there would be more field for his arrogating to himself extraordinary powers and extraordinary privileges; but it is clear, that in that capacity he is a creature of special statute, having this power given him by the act 1597 above quoted. As therefore, his powers are given him by statute, so it is apprehended, by statute only they ought to be explained; they cannot be extended wider than the statute authorises them to be, and it will not be supposed that unusual privileges are implied in the words of the statutes, that gave him his powers: There is no foundation in them for that very extraordinary privilege which he claims, of not being amenable in the ordinary courts of justice, and being accountable only to the Sovereign for the execution of his office: As therefore, the statutes themselves give no warrant for supposing him vested with such a privilege, so there is no precedent in any court tending to this purpose; on the contrary, many precedents have been quoted that have an opposite tendency. The respondent therefore, cannot be allowed to argue at large concerning the powers of his office, from hypotheses and supposals. The laws that made him are still in existence; and from these laws only can it be judged what powers and privileges were meant to be
be-

bestowed on him ; besides, that there is not the most remote foundation in those laws for the privileges which he now claims, they seem adverse to the principles of the *British* constitution ; and therefore, would not readily be received upon implications and constructions drawn from a statute, unless they were very plainly set forth in the words of it.

Upon the whole, therefore, the petitioner humbly apprehends, that the plea which is set up by the respondent in behalf of his office, that he is not judicially amenable to the courts of justice, is altogether unconstitutional, and consequently illegal :—If he, an officer appointed at the pleasure of the crown, is accountable only to the sovereign for his conduct in his office, and may at the same time refuse to bring to trial crimes which cannot be tried without his instance, there is certainly indirectly lodged in the crown, a power of disabling the penal laws of *Scotland*, contrary to the claim of right, whatever the respondent may pretend ; and tho' his conduct in this case must be judged of from the circumstances of the case itself, yet as the general point is of the utmost publick importance, it is humbly apprehended your Lordships will think proper to give a general judgment, concerning the powers of an office which the respondent has pleaded for, to such an extraordinary height.

In respect whereof, &c.

ILAY CAMPBELL.

ANDREW CROSBIE.

ROBERT BLAIR.

[illegible]

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ANDREW CROSBIE

ROBERT DAVIS